

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1085

To be argued by
IVAN S. FISHER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1085

UNITED STATES OF AMERICA,

Appellee,

— v. —

FRANK MOTEN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT FRANK MOTEN

IVAN S. FISHER
Attorney for Appellant
Frank Moten
400 Park Avenue
New York, New York 10022
(212) 355-2330

EDWARD M. CHIKOFSKY,
Of Counsel.

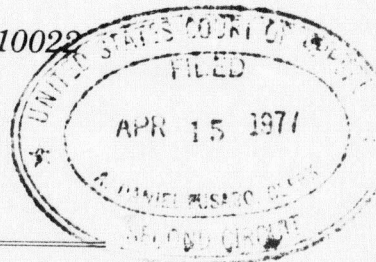


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BRIEF FOR APPELLANT

STATEMENT PURSUANT TO RULE 28(a) (3)

Preliminary Statement

Frank Moten appeals from a judgment of conviction entered on January 21, 1977, in the United States District Court for the Southern District of New York (Hon. Richard Owen, J.), after trial by jury, for unlawfully, wilfully and

knowingly conspiring to violate the federal narcotics laws, in contravention of Title 21, United States Code, §§ 173, 174, 846 and 963. In addition, Moten was adjudged guilty of two substantive counts of unlawful distribution and possession with intent to distribute cocaine, in violation of 21 U.S.C. §§ 812, 841(a)(1) and 841(b)(1)(A). Moten was sentenced to 25 years imprisonment, to be followed by a three-year term of special parole, and fined \$50,000.

Issue Presented for Review

Whether the mass trial of twenty-two defendants, and the District Court's denial of severance, deprived defendants of due process, in light of the protracted length of trial, the number of defendants, and the spillover effect of substantial prejudicial evidence admitted as to individual defendants subject to limiting instructions.*

Statement of the Case

Introduction

[Because] we must again deal with the consequences of the Government's ill-advised practice of attempting to obtain in a single trial convictions of numerous defendants

* In an effort to avoid presenting unnecessarily duplicative papers to this Court, Moten has briefed only what are believed the major errors affecting his conviction. Therefore, he joins in those issues raised by the other appellants insofar as they may be applicable. Rule 28 (i), Federal Rules of Appellate Procedure.

who are only loosely connected in a criminal enterprise...we must engage in a tedious summary of the relevant evidence....
United States v. Miley, 513 F.2d 1191,
1195 (2d Cir. 1975) (Friendly, J.).

The matter before the Court in the instant appeal involves a mass narcotics conspiracy trial. Prosecution of this action involved the trial of twenty two of the thirty-three defendants originally indicted, concerning a far-flung and loosely-related series of narcotics transactions covering an aggregate period of eight years. Trial of this massive conspiracy prosecution, consuming some thirteen [13] weeks, covered 9500 pages of transcript, twenty-two defendants, forty-five government witnesses and innumerable unindicted co-conspirators (only 17 of whom were named in the Government's Bill of Particulars).

Testimony adduced, and evidence admitted, at trial concerned innumerable individual transactions in cocaine and heroin between various co-conspirators, thereby forcing numerous defendants to sit through literally weeks of trial in which their alleged participation or involvement was never mentioned. Moreover, all defendants were forced to sit through interminable and wholly prejudicial testimony relating to alleged prior similar acts of various other defendants and co-conspirators which antedated significantly the starting point of the alleged conspiracy (1968).

Whether this aggregation of defendants and co-conspirators fits within the conventional rubric of single or multiple conspiracy, this prosecution represents yet another instance in which the United States Attorney for the Southern District of New York has flown in the face of this Court's clear and oft-repeated admonition that this type of sprawling massive conspiracy format is a fundamentally unfair prosecutorial vehicle. United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974); United States v. Miley, *supra*; United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975).

The indictment, alleging forty-seven overt acts in pursuance of the conspiracy, covering the period of October, 1968 through March, 1975, described the conspiratorial network in the now familiar formulation of the vertically-integrated loose-knit combination, despite its diffuse and unconnected participants.

Thus, Juan Antonio Alvarez, Angel Rodriguez, Sebastian Intersimone, among others, were characterized as importers and sources of supply; Moten and co-conspirator John T. ("Jack") Brown as wholesale middlemen; and appellants Hightower, Foster, J. & L. Sampson, Schennault, Wilson, Laws, Davis, Morris, Mitchell, Bonilla, Cowpers, and Jones, among others, as wholesale traffickers.

Moreover, the alleged transactions covered a broad geographic range, with certain conspirators centered in Florida, others in Washington, D.C., still others in Chicago, and the largest aggregation in the Southern District of New York and its environs.

The indictment, thus, was yet another instance of the Government's having failed to heed this Court's repeated warnings in the Sperling-Miley-Bertolotti trilogy admonishing the Government to desist in the mass prosecution of loosely-affiliated individuals in allegedly conspiratorial networks that are more susceptible to smaller, more manageable subdivisions than may be handled efficiently and, at least as importantly, fairly, in a large and unwieldy single-conspiracy format.

Severance

Virtually every defendant moved pre-trial for severance of the indictment, urging the District Court either to subdivide the indictment into smaller, more manageable subgroups or to exercise its supervisory power by requiring that the Government make such an election.

Given the enormous number of defendants involved, the eight-year time span of the indictment, and the geographic diversity of the defendants and co-conspirators, defendants proposed that, consonant with United States v. Sperling, supra, 506 F.2d at 1340, irrespective of whether the indictment charged single or multiple conspiracies, if, in view of the sheer size of the indictment and number of defendants and transactions, the acts charged could be viewed more reasonably as two or more conspiracies, overriding principles of due process and efficient judicial administration required that so massive a prosecution be subdivided into more manageable proportions.

Moreover, in light of the fact that two defendants, Moten and Juan Antonio Alvarez, residing in New York and Florida respectively, were charged in two separate counts with having been managerial organizers and supervisors of separate narcotics operations (21 U.S.C. §848), the inference was inescapable that discrete organizational and conspiratorial networks were improperly aggregated by the Government under the guise of a single conspiracy, where, in fact, a multiplicity of organizations realistically suggested themselves.

Accordingly, moving pre-trial for severance, defendants contended that there were compelling indicia that the acts charged should be viewed more reasonably as encompassing two or more conspiracies. Besides the thirty-three defendants named in the indictment, the Government's Bill of Particulars named an additional seventeen persons, thus increasing to fifty the number of alleged criminal participants the jury would have to remember and distinguish, without including the usual number of non-criminal individuals whom the Government would be expected to call to testify.

Moreover, defendants pointed to the fact that, besides those living in New York and its environs, six defendants lived in Florida (Juan Antonio Alvarez, Angel Rodriguez, Jose Luis Sureda, Nelson Alvarez, Eduardo Yaujar, Lazaro Yaujar); six in the Washington, D. C. area (Joseph Sampson, Lois Sampson, William Hightower, Sidney Foster, Anne Reynolds, Albert Lee Jones); three in Chicago (Yvonne Schennault, Donald O'Dood, and Al Williams); and one in South Carolina (Don Wilson).

Furthermore, the actual events charged in the indictment, spanning a period of more than seven years, took place in many of these cities. Similarly, it was pointed out that many other substantive offenses were not charged in the indictment presumably because venue properly would not lie (see Overt Acts 36 through 46).

Indeed, as defendants initially asserted, and the subsequent trial demonstrated, the crux of the Government's case centered around the activities and testimony of unindicted co-conspirator Jack Brown, the ubiquitous wholesaler and middleman who was the central figure and hub from which the remainder of the conspirators and defendants radiated, either as suppliers or purchasers.

According to the indictment, Brown dealt with at least three different groups of suppliers for both heroin and cocaine (J. Alvarez and Rodriguez (Florida) (cocaine); Intersimone (New York) (heroin); Capra, Guarino and Della Cava (New York) (heroin)). The latter three, at the time of indictment, were all incarcerated for their conviction in United States v. Capra, 501 F.2d 267 (2d Cir. 1974) and, thus, were the only defendants to be severed.

Moreover, as defendants brought to the District Court's attention, based upon the pleadings in this case, and the record in the related case of United States v. Capra, supra, none of these various discrete conspiratorial groups even knew the members of the other groups, much less dealt with them, their only connection being Brown as their common customer or supplier. The pleadings suggested, similarly, that many of the customers, based as they were in different cities, also could not have known each other.

Finally, as discussed supra, Counts Two and Three of the indictment charged violations of 21 U.S.C. §848 against defendants Moten and Juan Alvarez. In essence, these counts are mini-conspiracies within the larger charge, alleging two obviously separate and distinct conspiratorial subgroups. Of the seven persons named in each count as "workers", only one was common to both groups, again the ubiquitous trafficker Jack Brown. Indeed, the individuals allegedly involved in Count Two were all from Florida, while those in Count Three were all from New York. These seminal groups indicated one obvious line of divisibility of the charges in the indictment.

Besides the obvious severability of defendants into, respectively, two or three conspiratorial groups, as discussed supra, all defendants suggested to the District Court that severance along geographic lines would be not merely an appropriate division of prosecutorial labor, but would correspond, as well, to the relatively easily separable transactions of the various geographic groups, irrespective of whether these conspiratorial subgroups be deemed part of one massive conspiracy or several smaller ones.

Accordingly, all defendants moved that the indictment be severed into four discrete groups:

New York: Moten, Intersimone, Brightman, Morris,
Mitchell, Glaze, Bonilla, Cowpers,
Dunmore, Parker, Davis, Kellem;

Florida: J. Alvarez, N. Alvarez, Rodriguez,
Sureda, E. Yaujar, L. Yaujar, Wilson,
Laws;

Chicago: Schennault, Williams, O'Dood, Morgan,
Capra, Guarino, Della Cava;

Washington: Hightower, Foster, J. Sampson, L.
Sampson, Reynolds, Jones.

Of these four easily separable subgroups, the only common thread or personage to run through them all was co-conspirator Jack Brown.

By order dated June 24, 1976, the District Court denied defendants' severance motion, with the exception of Capra, Guarino and Della Cava.

Characterizing the severance motion as requiring a pretrial assessment in an area that has caused much discussion even after trial, the Court below rejected defendants' argument that, irrespective of whether single or multiple conspiracy was charged, the joint trial of such a massive indictment would subject defendants to the substantial risk of prejudicial spillover from testimony and evidence relating to tangentially-related co-defendants or co-conspirators. Accordingly, twenty-two defendants were forced to trial.

Mass Trial

The instant indictment was tried on the theory that there existed a single conspiracy to import and sell in excess of 200 kilograms of cocaine and heroin, having its source in South America and other countries, with its ultimate terminus in New York City, thereupon to be sold in other cities as well. The time-frame of the conspiracy extended from January, 1968 until April, 1976.*

However, as revealed by the Government in its opening statement, its allegations and proof were at substantial variance with its theory, for it averred to the jury not only that defendants Juan Alvarez and Frank Moten ran their own narcotics organizations (Tr. 522), but that two other conspiratorial groups were involved; one supplying heroin, the other supplying cocaine (Tr. 524).

The principal evidence at trial, not unexpectedly, consisted primarily of the testimony of co-conspirator Jack Brown, and co-defendant Michael Parker, Brown's son-in-law, who participated in Brown's drug business from 1969 through 1974, both of whom testified for several weeks.

Brown, a long-time narcotics addict and wholesaler with an extensive criminal record dating back to the 1940's,

* Although the indictment dates the beginning of the conspiracy as January 1, 1968, extensive testimony was permitted as to events and transactions occurring as early as the late 1950's.

demonstrated that his role in the conspiratorial network was that of a core-conspirator, having had various narcotics dealings, either buying or selling, with virtually every named defendant over the entire course of the conspiracy.

Brown's life, as portrayed by him, can only be described as a cross between John Dillinger and "Machine Gun" Kelly. He was a self-confessed perjurer, firearms fetishist and narcotics addict, who had never maintained any substantial gainful employment, except, significantly, when he was befriended by Frank Moten, a Harlem businessman, who attempted, initially, to involve him in legitimate business activities in the Harlem community; which attempt, given Brown's incorrigible propensities, was wholly unavailing.

Thereupon, Brown reverted to his former life as a purveyor of narcotics - in which he occupied himself since the 1950's, with the exception of a four-year period of imprisonment in the early 1960's. His extensive narcotics dealings encompassed virtually all defendants and, indeed, the total scope of his nefarious activities far transcended the named defendants in this prosecution.

Brown dealt narcotics openly from the time of his release from prison (July, 1964) until his indictment in April, 1973 in United States v. Capra, supra. Thereupon, he

went underground, hiding first in Coney Island until November, 1973 at which time he fled to Florida, from whence he continued operations on a long-distance basis through his son-in-law, Michael Parker. He finally surrendered to the FBI in Washington, D. C. on April 7, 1975.

Significantly, as the nature of the Government's case progressed, it soon became readily apparent that, while various defendants may, in fact, have had dealings, or personal relationships, with Brown, few, however, had significant contacts with their respective co-defendants.

Accordingly, with certain exceptions, virtually all defendants were linked together by the Government, despite the geographic diversity and the differing time-frames of their alleged conspiratorial involvement, by their common connection with Jack Brown, either as buyers or sellers.

Thus, despite the Government's generalized characterization of the conspirators as operating a vertically-integrated, loose-knit combination (United States v. Bynum, 485 F.2d 490, 495 (2d Cir. 1973); United States v. Mallah, 503 F.2d 971 (2d Cir. 1974)), the proof adduced suggested, rather, a discrete, separable group of co-conspirators operating out of Miami, Washington, D.C., Chicago and New York, having little significant contact with one another, whose sole focal point was their occasional and discrete contact with Jack Brown.

Thus, testimony as to the Florida-based defendants and conspirators consisted in large measure of Brown's anfractuous recollections of his numerous multi-kilogram cocaine purchases from Juan Alvarez and Angel Rodriguez, both in Miami and New York, over a seven-year period (1968-1974), which purchases were later resold by Brown to various small-scale traffickers either for cash or on "consignment" for resale.

Curiously, however, while Brown arranged various purchases from Alvarez and Rodriguez, it did not appear that his purchases were in any way related to the specific demands or orders of his customers, nor were his customers aware of, or in any way related to, the source of his merchandise.

Sebastian Intersimone was identified by Brown as a regular and consistent source of heroin since they met initially in late 1950's (excepting a brief period in the early 1960's when Brown was incarcerated). Intersimone apparently had little day-to-day contact with Brown and his nefarious operations, having left New York City in 1970, and their contacts thereupon became more social in nature. Interestingly, however, while Brown discussed extensive narcotics transactions with Intersimone during the period antedating the conspiracy (pre-1968), there is testimony concerning only

one significantly relevant transaction involving Intersimone during the early 1970's, the focal point of the conspiracy.

Severed defendants John Capra, Leoluca Guarino and Steven Della Cava represented Brown's third major importation source. According to Brown, these severed co-conspirators were his other principal source of heroin between 1970 and 1973, with Della Cava having been the major supplier of the trio.

Frank Moten occupied a somewhat amorphous position, having been neither buyer nor seller, but operating, rather, in the intermediate position of advisor and "financier" of various of Brown's transactions. Moten operated less as an investor and financier than simply a repository of Brown's extensive cash transactions, laundering money for Brown in various local banks and retaining the money for Brown in lieu of a safe-deposit box. While Moten may have had temporary custody of Brown's ill-gotten pelf, he retained the money under specific instructions that he return on three days' notice any sums demanded by Brown, in order for him to continue his narcotics transactions.

Thus, while Brown testified as to Moten's having acted as "financier" of his operation, Moten's role, in fact, appeared to be that of a passive repository, who held Brown's money in the nature of a fiduciary, and who, on occasion,

vouched for the purchases of several of Brown's purchaser, notably Glaz and Morris.* Despite the Government's characterization of Moten as an organizational "king-pin", only two sales of narcotics were actually proven against him, both for small amounts (one kilogram) of cocaine.**

Besides the tripartite wholesale importers (Alvarez and Rodriguez; Intersimone; Capra, Guarino and Della Cava), and the wholesale middlemen (Brown and Moten), the remaining defendants, with rare exception, were involved primarily with Brown directly as purchasers and small-scale traffickers in heroin and cocaine. In point of fact, few had any direct contact with the importers or with Moten, except through Brown.

Indeed, the testimony failed to reveal that the dates and times of shipments received by Brown had any causal nexus with the various purchases by Brown's customers, thus negating the implication that the various and separable network of conspirators had any direct and relevant connection, except through Jack Brown.

* Moten was also accused of having conspired with defendant Bernard Brightman, as to whom the jury deadlocked, and who was subsequently acquitted on retrial.

** The jury deadlocked as to Moten on the so-called §848 count, supra, and it was subsequently dismissed.

Thus, the Chicago conspirators (Yvonne Schennault, Al Williams and Donald O'Dood) dealt directly with Jack Brown in various heroin and cocaine purchases in New York between 1968 and 1974, with Schennault having travelled to Florida in February, 1974, principally to purchase cocaine from Brown. Schennault never dealt directly with Intersimone (New York) or Alvarez (Florida), having been involved strictly with Brown, who, as is apparent, was the hub of this allegedly "integrated" conspiracy wherein, few, if any, traffickers had any direct contact with, or knowledge of, either the importers or their other fellow traffickers.

The Washington segment, dealing with Brown and his son-in-law, co-defendant Michael Parker, consisted of two separate groups, the husband-and-wife team of Joseph and Lois Sampson, and the partnership of William Hightower and Sidney Foster. According to Brown, Hightower and Foster were partners who jointly purchased heroin and cocaine in New York from 1966 until 1972, at which time Foster stopped purchasing. However, Brown continued to supply Hightower through Parker until 1974.

The Sampsons, however, who had been purchasers since 1967-68, split up in 1971, and Brown thereafter sold to Joseph ("Boot") and Lois jointly until 1972 and to Lois separately

until 1973. Moreover, Lois travelled to New York on several occasions to stay at Brown's home in Orangeburg, in order to care for Brown's infant child. During this period, relations between the Sampsons were strained at best. In the course of one of their visits to Orangeburg in 1972, "Boot" apparently shot Lois in the toe - this during one of their periods of "reconciliation."

The remaining co-defendants (Wilson, Laws, Davis, Morris, Mitchell, Bonilla) were all small-scale purchasers operating primarily out of the New York-New Jersey metropolitan area. Their contacts were almost exclusively connected with Brown and there was minimal direct contact between them and the importers, or the Washington, Florida or Chicago connections.

Trial By Ambush

Clearly, with twenty-two defendants on trial for transactions involving some fifty defendants and co-conspirators, covering an eight-year period and a vast geographic expanse, the sheer volume of testimony produced on behalf of the Government was enormous.

Yet, while the only testimony relevant to defendants' involvement in the conspiracy concerned transactions

occurring since 1968, the Government persisted in repeatedly introducing extensive testimony concerning alleged criminal acts prior to 1968 on the grounds that these were "prior similar acts" demonstrating individual defendants' propensity to engage in such conduct during the conspiracy proper.

Moreover, extensive testimony was introduced as to separate criminal acts not part of the conspiracy by various defendants, which were admitted subject to limiting instructions (e.g. Tr. 5632-37).

Under ordinary circumstances, while a jury may be capable of following limiting instructions as to a single discrete piece of evidence, in the instant case, where the jury was asked to make difficult and exceedingly fine distinctions as to the guilt or innocence of some twenty-two individuals, the obvious effect of this evidence, when admitted in a twenty-two defendant trial, was to further and unnecessarily confuse and blur the distinctions between defendants and their alleged involvement in this conspiracy. The Government's tactics thus realized the worst fears of the defendants when they initially had moved for pretrial severance.

Thus, substantial testimony was elicited concerning numerous criminal transactions involving various defendants (e.g., Moten, Intersimone and Morris) dating back to the 1950's,

as well as the criminal activities of numerous other co-defendants relating to the early-and mid-1960's.

Defendants repeatedly requested limiting instructions in order that the jury be admonished that such testimony had relevance only as to that particular defendant against whom it was offered.

The effect and utility of such limiting instructions was vitiated substantially, however, by the sheer volume of such evidence. As the days of trial stretched to weeks and months, preconspiracy evidence was repeatedly admitted, first as to one defendant, then as to another, until the spillover between defendants was quite impossible to demarcate.

After a time, the cumulative spillover effect of such "limited" evidence took its obvious toll on a jury charged with separating the fates of twenty-two individual defendants. While it could have disregarded such testimony in toto, in this instance it was instructed to consider it, albeit only for "limited" purposes, a feat of mental gymnastics against which more than one defense counsel railed (Tr. 5717).

Not only were all defendants being tried, in effect, for pre-conspiracy activities otherwise protected by the statute of limitation, but twenty-two individuals, who had a right to be tried by a jury whose attention was undistracted

by irrelevant, prejudicial evidence, were made to suffer the prejudicial spillover of testimony otherwise inadmissible as to them being brought repeatedly to the jury's attention under the legal fiction that it would be considered only in "limited" fashion.

In a trial of such protracted size and length, it was thus inevitable that distinctions between defendants would be hopelessly blurred and that the jury's response would be to confuse and aggregate all defendants, irrespective of their particular roles or individual degrees of involvement or culpability in the conspiracy proper.

Moreover, were the prejudicial spillover of this limited testimony not enough, the Government saw fit to introduce inflammatory and wholly irrelevant evidence regarding the murders and violent deaths of alleged co-conspirators and participants of defendants, most notably, the 1972 death of Willie Womack, an alleged business associate of Jack Brown and Frank Moten.

None of the defendants participated, nor were they in any way involved, in the murders alleged, nor did any defendants have any connection to the barbaric and violent behavior of Jack Brown that was adduced at trial.

Yet the fact that these shocking crimes and activities were brought out at all, with the unspoken inference that the defendants were somehow responsible, created the potential for such spillover prejudice as to poison the minds of a jury attempting to evaluate individual guilt or innocence into condemning without distinction anyone even remotely connected with the malodorous Jack Brown.

ARGUMENT

THE GOVERNMENT'S MASS TRIAL OF TWENTY-TWO DEFENDANTS CREATED SUCH SPILLOVER AS TO PREJUDICIAL TESTIMONY WITH WHICH DEFENDANTS WERE NOT CONNECTED AS TO DENY DUE PROCESS

The Government's insistence upon indicting thirty-three defendants, of whom twenty-two were forced to trial, in one massive proceeding, lasting thirteen weeks and covering some 9500 pages in the record, denied appellants due process, where vast amounts of testimony and evidence were admitted limited to individual defendants, and where various appellants were forced to sit through weeks at trial during which their alleged involvement was not mentioned at all.

This Court has recently considered the results of the Government's persistent penchant for utilizing the mass-trial format in cases such as this, where a far-flung and loosely-connected aggregation of defendants are charged with a series of transactions occurring over a protracted period of time and vast geographic expanse.

In what has become an oft-cited trilogy of cases regarding the problems of mass-conspiracy trials, this Court has repeatedly cautioned the Government that, irrespective of the conspiratorial format, where the vast and diffuse nature of defendants and transactions charged lend themselves more appropriately to subdivision of defendants into smaller, more manageable subgroups, it was incumbent upon the Government and the District Court, in the exercise of its supervisory power, in the interests both of due process and efficient judicial administration, to avoid the almost inevitable spill-over prejudice that is created by trying vast numbers of loosely-connected defendants in one trial. United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974); United States v. Miley, 513 F.2d 1191 (2d Cir. 1974); United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975).

In United States v. Sperling, *supra*, two groups of co-conspirators were involved: Sperling and his confederates

distributing heroin; Pacelli and his confederates distributing cocaine. While finding the nexus between the two groups arguably sufficient to furnish grounds for a single trial, this Court set forth strong views concerning the Government's mass-conspiracy format:

"In view of the frequency with which the single conspiracy vs. multiple conspiracies claim is being raised on appeals before this court,...we take this occasion to caution the government with respect to future prosecutions that it may be unnecessarily exposing itself to reversal by continuing the indictment format reflected in this case. While it is obviously impractical and inefficient for the government to try conspiracy cases one defendant at a time, it has become all too common for the government to bring indictments against a dozen or more defendants and endeavor to force as many of them as possible to trial in the same proceeding on the claim of a single conspiracy when the criminal acts could be more reasonably regarded as two or more conspiracies, perhaps with a link at the top. Little time was saved by the government's having prosecuted the offenses here involved in one rather than two conspiracy trials.²⁵ On the contrary, many serious problems were created at the trial level, including the inevitable debate about the single conspiracy charge, which can prove seriously detrimental to the government itself. We have already alluded to our problems at the appellate level, where we had to comb through a voluminous record to give adequate consideration to the claims of eleven separate appellants." (Emphasis supplied).

* * * *

n. 25 The government has emphasized the admittedly symbiotic aspects of the relationship between the Pacelli and Sperling organizations in an effort to justify its decision to try the members of both groups together. While there is clear evidence of drug sales between Pacelli and Sperling, the ties among the members of each group were much stronger than the ties between the two organizations. It would have been much wiser for the government to have tried the appellants in two separate actions, one incorporating those linked with the Pacelli group and the other incorporating those linked with Sperling. Except for Lipsky, there was no common witness against members of both groups." Id., 506 F.2d at 1340.

Indeed, the Sperling court's admonition was all the more compelling in the instant case, where, as in Sperling, there was but one co-conspirator common to the various groups - the ubiquitous Jack Brown, the one common thread who dealt with the Florida group, the Chicago group, the Washington segment, as well as the various individual purchasers and sellers in New York, who by themselves had little or no direct contact with the other purchasers and sellers from around the country.

Similarly, United States v. Miley, supra, repeated Sperling's warnings that the mass-conspiracy format was "ill-advised" and invited reversals. Id., 513 F.2d at 1207 n.10, 1210.* There, the convictions were not overturned

* United States v. LaVecchia, 513 F.2d 1210, 1221 (2d Cir. 1975) (Mulligan, J. concurring) remonstrated with the Government for the problems it created by such mass conspiracy trials.

only because, by contrast with the instant case, the trial was short, the defendants were few, and there was no testimony as to any particular defendant which differed substantially from that of any others. Id., 513 F.2d at 1209.

Finally, in United States v. Bertolotti, 529 F.2d 149 (2 Cir. 1975), this Court ceased its hortatory warnings and simply reversed, finding that the single conspiracy alleged by the Government was, despite the common group, really several discrete conspiracies. The Court found further that each defendant had been "subjected . . . to voluminous testimony related to unconnected crimes in which he took no part" (529 F.2d at 157). Moreover, additional prejudice was found from the "obviously shocking and inflammatory discussions about assault, kidnapping, guns and narcotics" which, although probative on one conspiracy, had no relevance to the other transactions proved at trial (529 F.2d at 158).

Clearly, then, this Court has admonished the Government with ever-increasing frequency that its penchant for indicting and trying a multiplicity of defendants is not merely administratively undesirable, creating unwarranted burdens at both trial and appellate levels, but raises

substantial questions of prejudice to defendants' substantive and procedural rights.*

Thus, in assessing the propriety of such mass-conspiracy trials, this Court has demonstrated that among the factors it would scrutinize are the actual extent and nature of contacts and transactions among the alleged conspirators; whether the ties among members of one group are stronger than those between different segments; and whether there are common witnesses on the different segments. Moreover, the Court has demonstrated a willingness to reject the single-conspiracy argument even where there are links at the top or some other common core.

Most importantly, in this mass-trial format, where the danger of spillover prejudice among multiple defendants is particularly dangerous, irrespective of whether the trial be denominated single or multiple conspiracy, among the relevant considerations warranting reversal are: the size of the case (Sperling suggested problems with twelve defendants and a 4000-page record); whether the testimony includes "shocking and inflammatory" material (Bertolotti); and

* Cf. United States v. Spock, 416 F.2d 165, 171 n.12: "The occasionally asserted judicial hostility to conspiracy prosecutions...springs largely from the government's overenthusiastic use of some of the procedures of conspiracy law rather than from a rejection of the public interest served by the law."

whether the Government at any time viewed the individual segments as different conspiracies (Bertolotti).

Thus, as this Court has enunciated in United States v. Bertolotti, supra, among the factors to be weighed in evaluating the prejudicial impact of such a mass-trial format are:

1. The number of defendants and co-conspirators involved;
2. The length of the trial;
3. The extent of illegal activities of others not on trial;
4. The introduction of inflammatory or shocking testimony with respect to which a particular defendant is not connected.

In the instant case, the Government saw fit to join thirty-three defendants and to name at least 17 co-conspirators in its Bill of Particulars. This Court reversed a similar conviction in Bertolotti which involved seventeen trial defendants and 31 co-conspirators. Kotteakos v. United States, 328 U.S. 750 (1946) involved thirteen defendants and 4 unindicted co-conspirators.

Moreover, this trial was one of the longest narcotics conspiracy prosecutions in the Southern District of New York. It consumed thirteen [13] weeks of trial and in excess of

9500 pages of transcript. This Court reversed in Bertolotti, which consumed only four weeks of trial and involved only 2700 pages of transcript.

Clearly, the number of defendants and the length of trial are of critical importance in determining the guilt or innocence of individuals who run the substantial likelihood and risk of being condemned for acts committed by others to whom they are totally unrelated.

Besides the obvious impossibility of expecting a jury to particularize the evidence against single individuals where it must keep track of fifty or more, there is also the substantial danger that, even if capable of particularization, the jury's mood would rapidly turn, after thirteen grueling weeks, from specific assessment of the facts to a generalized belief that anyone remotely involved in this trial surely must be guilty.

Moreover, there is obviously a subliminal effect upon jurors exposed to thirteen weeks of testimony concerning cocaine and heroin. And, indeed, the prejudicial impact upon the jury of Jack Brown's testimony concerning his life of violence, guns, and obvious paranoia - matters in which no defendants had any connection - is incalculable. Indeed, as this Court noted in Bertolotti:

The prejudicial effect, however, of requiring the jury to spend two entire days listening to obviously shocking and inflammatory discussions about assault, kidnapping, guns and narcotics cannot be under-estimated. No defendant ought to have a jury which is considering his guilt or innocence hear evidence of this sort absent proof connecting him with the subject matter discussed. With respect to at least five of the appellants, no such proof was ever convincingly produced.

Id., 529 F.2d at 158.

It is manifest, then, that thirty-three defendants were aggregated in one proceeding by the Government in order to maximize the inherently prejudicial spillover that was bound to accrue between defendants of differing degrees of involvement, some of whose defenses were inconsistent, and others who were only tangentially involved at all.

Furthermore, the Government's gratuitous introduction of prejudicial and inflammatory testimony regarding the murders of various of defendants' confreres - acts with which no defendants were involved - served no relevant purpose but to divert the jury's attention from evaluating individual guilt or innocence in order to poison its mind against the defendants en masse.

Moreover, the voluminous testimony introduced as to individual participants in this twenty-two defendant trial

was inherently prejudicial as to all defendants, who were forced to sit through weeks and months of trial at which their own individual involvement was alluded to only sporadically.

It cannot seriously be maintained that, after thirteen grueling weeks of trial, at which testimony was introduced as to some fifty or more individuals, covering an almost ten-year period, the jury was capable, realistically, of following, much less remembering, the trial court's multitudinous limiting instructions.*

Recognizing the inherent implausibility of expecting such "mental gymnastics" from a jury, the D. C. Circuit, in Sims v. United States, 405 F.2d 1381 (D.C. Cir. 1968), reversed the convictions of three appellants jointly tried for murder where the trial judge, on no less than 15 occasions during trial, instructed the jury to disregard inculcatory statements except as to the appellant who actually made them.

In reversing the convictions, the D. C. Circuit characterized the situation as a classic situation in which

* See Judge Learned Hand's famous apothegm in Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932), that a cautionary instruction is a "recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's." Cf. Jackson v. Denno, 378 U.S. 368 (1964).

prejudice cannot be erased and severance is called for, by asking the jury to perform a realistically impossible feat. Id., 405 F.2d at 1383; see United States v. Bozza, 365 F.2d 206, 217 (2d Cir. 1966) ((Friendly, J.); Kramer v. United States, 317 F.2d 114 (D.C. Cir. 1964).

Here, "limited" evidence was being admitted as to one or another of the twenty-two defendants almost every other day over the course of this thirteen-week trial. Even with such limiting instructions, the trial court could not, with a mere verbal incantation, undo the massive prejudice that inured to all defendants as trial progressed for months. United States v. Falley, 489 F.2d 33, 38 (2d Cir. 1973).

The conclusion, thus, is inescapable that the sole reason for the instant prosecutorial format was the tactical advantage and convenience to the Government of a mass conspiracy trial. United States v. Bertolotti, supra, 529 F.2d at 155.

Once again, the Government has openly defied this Court's warning in Sperling and its reiteration in Miley. If this Court was more indulgent in Miley because indictment and trial preceded Sperling (513 F.2d at 1207 n.10), Bertolotti serves as ample demonstration that no further tolerance would be countenanced where, as in the instant

case, Sperling was blatantly disregarded (529 F.2d at 155 n.10).

CONCLUSION

For the reasons stated above, the judgment of conviction should be reversed, and the indictment dismissed.

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Respectfully submitted,

IVAN S. FISHER
Attorney for Appellant
Frank Moten
400 Park Avenue
New York, New York 10022
(212) 355-2380

Edward M. Chikofsky,
Of Counsel.

